IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 11, 2008 Session

Edith L. Freemon v. Logan's Roadhouse, Inc..

Appeal from the Circuit Court for Davidson County
No. 05C-1703 Walter Kurtz, Judge

No. M2007-01796-COA-R3-CV - Filed February 25, 2009

Patron of restaurant which allowed and encouraged customers to discard peanut shells on the floor as part of restaurant decor appeals summary judgment granted to restaurant in suit seeking to recover damages when she fell in the restaurant. The trial court granted the restaurant's motion, holding that restaurant did not owe a duty to patron because the presence of the peanut shells was not a latent or hidden condition and did not create a defective or dangerous condition which presented a foreseeable risk of serious injury. In addition, the court found that no reasonable jury could find that patron was not at least 50% at fault for her injuries. Finding that the trial court erroneously granted summary judgment, we reverse the case and remand for further proceedings.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed and Remanded

RICHARD H. DINKINS, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., and ANDY D. BENNETT, JJ. joined.

Matthew J. Sweeney and Sonya R. Smith, Nashville, Tennessee, for the appellee, Logan's Roadhouse, Inc.

Aubrey Timothy Givens and James Lee Widrig, Nashville, Tennessee, for the appellant, Edith L. Freemon.

OPINION

I. Factual Background

On June 18, 2005, Edith Freemon was a patron at Logan's Roadhouse Restaurant ("Logan's"), a restaurant which serves peanuts and encourages its patrons to throw the shells on the floor. As Ms. Freemon was walking through the restaurant she stepped on some of the shells and fell, injuring herself. She subsequently brought suit against Logan's alleging that Logan's knowingly allowed a dangerous condition to exist and that Logan's breached its duty to keep the premises reasonably safe and to warn of the dangerous condition. Logan's answered, denying the claims of Ms. Freemon and alleging, *inter alia,* that Ms. Freemon was contributorily negligent and that her negligence was equal to or greater than any negligence of Logan's.

Logan's thereafter moved for summary judgment; its motion was supported by the affidavit of Tony Noble, Logan's manager at the time of the incident, the deposition of Ms. Freemon, and a statement of undisputed material facts. Ms. Freemon responded to the motion with an affidavit and response to Logan's statement of undisputed material facts as well as the deposition of John Gluth, risk manager of Logan's at the time of the incident. The court granted the motion, stating:

> The presence of peanut shells on the floor was not debris and was open and obvious; Defendant Logan's did not have knowledge superior to Plaintiff's of that condition. The Court finds that Defendant Logan's did not owe a duty to Plaintiff both because the presence of peanut shells on the floor did not create a dangerous or defective condition and because it was not a reasonably foreseeable probability that she would be seriously injured.

Ms. Freemon appeals the grant of summary judgment, asserting that there were genuine issues of material fact in dispute and that a duty was owed by Logan's to Ms. Freemon.

II. Standard of Review

This appeal is from a grant of summary judgment. Summary judgment is appropriate where a party establishes that there is no genuine issue as to any material fact and that a judgment may be rendered as a matter of law. Tenn. R. Civ. P. 56.04; *Stovall v. Clark*, 113 S.W.3d 715, 721 (Tenn. 2003). Moreover, it is proper in virtually all civil cases that can be resolved on the basis of legal issues alone, *Byrd v. Hall*, 847 S.W.2d 208, 210; *Pendleton v. Mills*, 73 S.W.3d 115, 121 (Tenn. Ct. App. 2001); however, it is not appropriate when genuine disputes regarding material facts exist. Tenn. R. Civ. P. 56.04. The party seeking a summary judgment bears the burden of demonstrating that no genuine disputes of material fact exist and that the party is entitled to judgment as a matter of law. *Godfrey v. Ruis*, 90 S.W.3d 692, 695 (Tenn. 2002). To be entitled to summary judgment, the moving party must affirmatively negate an essential element of the non-moving party's claim or show that the moving party cannot prove an essential element of the claim at trial. *Martin v. Norfolk Southern Railway Co.,* 271 S.W.3d 76, 83 (Tenn. 2008).

Summary judgments do not enjoy a presumption of correctness on appeal. *BellSouth Adver. & Publ'g Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003). This court must make a fresh determination that the requirements of Tenn. R. Civ. P. 56 have been satisfied. *Hunter v. Brown*, 955 S.W.2d 49, 50-51 (Tenn. 1977). We consider the evidence in the light most favorable to the non-moving party and resolve all inferences in that party's favor. *Stovall,* 113 S.W.3d at 721; *Godfrey,* 90 S.W.3d at 695. When reviewing the evidence, we first determine whether factual disputes exist. If a factual dispute exists, we then determine whether the fact is material to the claim or defense upon which the summary judgment is predicated and whether the disputed fact creates a genuine issue for trial. *Byrd,* 847 S.W.2d at 214; *Rutherford v. Polar Tank Trailer, Inc*., 978 S.W.2d 102, 104 (Tenn. Ct. App. 1998).

The summary judgment analysis has been clarified in two recent opinions by the Tennessee Supreme Court. *See Martin v. Norfolk Southern Railway Co.*, 271 S.W.3d 76 (Tenn. 2008); *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1 (Tenn. 2008). A party is entitled to summary judgment only if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04; *accord Penley v. Honda Motor Co.*, 31 S.W.3d 181, 183 (Tenn. 2000). The moving party has the ultimate burden of persuading the court that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *Byrd,* 847 S.W.2d at 215. Accordingly, a properly supported motion for summary judgment must show that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *See Staples v. CBL & Assocs., Inc.*, 15 S.W.3d 83, 88 (Tenn. 2000); *McCarley v. W. Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998). The moving party may make the required showing and therefore shift the burden of production to the nonmoving party by either: (1) affirmatively negating an essential element of the nonmoving party's claim; or (2) showing that the nonmoving party cannot prove an essential element of the claim at trial. *Hannan,* 270 S.W.3d at 8-9; *see also McCarley*, 960 S.W.2d at 588; *Byrd*, 847 S.W.2d at 215 n.5. If the moving party makes a properly supported motion, then the nonmoving party is required to produce evidence of specific facts establishing that genuine issues of material fact exist. *McCarley*, 960 S.W.2d at 588; *Byrd*, 847 S.W.2d at 215. The nonmoving party may satisfy its burden of production by:

> (1) pointing to evidence establishing material factual disputes that were over-looked or ignored by the moving party; (2) rehabilitating the evidence attacked by the moving party; (3) producing additional evidence establishing the existence of a genuine issue for trial; or (4) submitting an affidavit explaining the necessity for further discovery pursuant to Tenn. R. Civ. P., Rule 56.06.

McCarley, 960 S.W.2d at 588; *accord Byrd*, 847 S.W.2d at 215 n.6; *Martin* 271 S.W.3d at 83-84.

III. Discussion

A. The Duty Owed Ms. Freemon

For the owner or operator of premises open to the public to be held liable for negligence in allowing a dangerous condition to exist, the plaintiff must prove the elements of negligence[1] and, in addition, that the condition alleged to be dangerous was caused or created by the owner, operator or agent or, if the condition was created by someone other than the owner, operator or agent, that the owner or operator had actual or constructive knowledge of the condition prior to the incident. *Blair v. West Town Mall,* 130 S.W.3d 761, 764 (Tenn. 2004) (citing *Martin v. Washmaster Auto Center, U.S.A.,* 946 S.W.2d 314, 318 (Tenn. Ct. App. 1996)).

Prior court decisions have established the doctrines and rules of law governing the duties of an owner of a business premises and under what circumstances the owner does and does not owe a duty to a customer. Owners of business premises are not insurers of their customers' safety. *Psillas*

[1] The elements of negligence are: (1) a duty of care owed to the plaintiff by the defendant; (2) conduct by the defendant falling below the standard of care amounting to a breach of the duty; (3) injury or loss to plaintiff; (4) causation in fact; and (5) proximate causation. *Rice v. Sabir,* 979 S.W.2d 305, 308 (Tenn. 1998); *see Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 355 (Tenn. 2008).

v. Home Depot, U.S.A., Inc., 66 S.W.3d 860, 864 (Tenn. Ct. App. 2001) (citing *McClung v. Delta Square Ltd. P'ship*, 937 S.W.2d 891, 902 (Tenn. 1996); *Shofner v. Red Food Stores (Tenn.), Inc.*, 970 S.W.2d 468, 470 (Tenn. Ct. App. 1997)). Accordingly, owners of business premises do not owe a duty to protect their customers from any and all risks. Nevertheless, "premises owners have a duty to use reasonable care to protect their customers from unreasonable risks of harm." *Id.* (citing *Rice v. Sabir*, 979 S.W.2d at 308; *Hudson v. Gaitan*, 675 S.W.2d 699, 703 (Tenn. 1984); *Jackson v. Bradley*, 987 S.W.2d 852, 854 (Tenn. Ct. App. 1998)). This duty includes maintaining the premises in a reasonably safe condition either by removing or repairing potentially dangerous conditions or by helping customers and guests avoid injury by warning them of the existence of dangerous conditions that cannot, as a practical matter, be removed or repaired. *Id.* (citing *Blair v. Campbell*, 924 S.W.2d 75, 76 (Tenn. 1996); *Eaton v. McLain*, 891 S.W.2d 587, 593-94 (Tenn. 1994)).

The existence of a legal duty, the first element of negligence, is a question of law for the court. *Coln v. City of Savannah,* 966 S.W.2d 34, 39 (Tenn. 1998). The key factor in determining whether a duty is owed in a particular circumstance is the foreseeability of a risk of injury, as one owes a duty "to refrain from engaging in conduct that creates an unreasonable and foreseeable risk of harm to others." *Satterfield*, *supra.* at 363. The duty does not arise, even if there is causation in fact, if the injury which occurred could not have been reasonably foreseen. *Doe v. Linder Constr. Co.*, 845 S.W.2d 173, 178 (Tenn. 1992). Whether a duty arises involves a balancing process; the duty arises when "the degree of foreseeability of the risk and gravity of the harm outweigh the burden that would be imposed if the defendant were required to engage in an alternative course of conduct that would have prevented the harm." *Satterfield, supra.,* at 366 (citing *West v. E. Tenn. Pioneer Oil Co.,* 172 S.W.3d 545, 551 (Tenn. 2005);[2] *Burroughs v. Magee,* 118 S.W.3d at 329; *McCall v. Wilder,* 913 S.W.2d 150, 153 (Tenn. 1995). This process applies even if the condition causing the injury is "purportedly open and obvious." *Rice v. Sabir,* 979 S.W.2d at 309 (citing *Coln, 966 S.W.2d at 43).* In determining whether a duty exists, the court's role "is limited to assessing whether there is some probability or likelihood of harm that is serious enough to induce a reasonable person to take precautions to avoid it." *Satterfield, supra.* at 367. In so doing, the court is required to draw a "razor thin" distinction between the legal determination of foreseeability and factual determinations relevant to the breach of such duty as may be found. *Satterfield,* 266 S.W.2d at 377 (Holder, J., concurring in part and dissenting in part).

As the movant, Logan's had the burden of showing the absence of a genuine issue of material fact and that it was entitled to judgment as a matter of law on the question of whether it owed a duty to Ms. Freemon, an essential element of her claim. *See Godfrey*, 90 S.W.3d at 695. If Logan's made its required showing, then Ms. Freemon was required to produce evidence of specific facts establishing that genuine issues of material fact exist. *See McCarley*, 960 S.W.2d at 588; *Byrd*, 847 S.W.2d at 215. Logan's contends that it owed no duty to Ms. Freemon because: (1) the presence of peanut shells on the floor was not a hidden or latent condition; (2) the floor was not in a dangerous condition due to the presence of peanut shells; and (3) Logan's did not foresee the probability that

---

[2] "A risk is foreseeable if a reasonable person could foresee the probability of its occurrence or if the person was on notice that the likelihood of danger to the party to whom is owed a duty is probable."

West v. E. Tenn. Pioneer Oil Co., 172 S.W.3d at 551.

Ms. Freemon would fall and be injured. Ms. Freemon asserts to the contrary that "[t]he presence of peanut shells on the floor, even though intentionally part of the Defendant's decor, create a dangerous or defective condition which does present a foreseeable risk of serious injury," thereby creating a duty of care. The issue before us is not whether *any* risk is presented by the presence of peanut shells on the floor but, rather, whether such risk as may be present is foreseeable and unreasonable.[3] In making this determination, we are to divine the probability or likelihood of harm arising from the activity. *See Rice v. Sabir,* 979 S.W.2d at 309.

Mr. Noble's affidavit, filed in support of the Motion, states in pertinent part:

> 3. We give a complimentary basket of peanuts to our customers at their tables.[4] As part of the roadhouse decor we encourage customers to throw their peanut shells on the floor. This practice of throwing peanuts and shells on the floor is one of the ways that Logan's markets and sells to customers and sets itself apart from other restaurants. . . .
>
> 4. Logan's purchases and serves dry roasted peanuts to its customers. A copy of the Product Specification Sheet for the peanuts Logan's serves is attached as Exhibit B. Dry roasted peanuts are not oily and their shells do not have an oily residue.[5] Logan's routine practice is to sweep after each shift and to sweep during periods when peanut shells have accumulated. Waiters, hostesses and other employees are trained to pick up any foreign objects included but not limited to silverware or napkins and immediately cleanup any spills with regard to foods or liquids. Each night the facility cleans the floor in addition to the cleaning that is done throughout the day.
>
> ***
>
> 6. I checked the floor in the area where she fell immediately after she fell and there were no signs of any defects or foreign objects. The floor was dry in the area where she fell and there were no slick spots. Of course, there were peanut shells on the restaurant floor throughout the restaurant.
>
> 7. We had no notice that there was any defect or dangerous condition on the floor in the area where Mrs. Freemon fell, before she fell.

---

[3] Logan's does not identify any alternative conduct which would achieve the desired marketing advantage; consequently, we consider only foreseeability of risk and gravity of harm and do not consider the burden imposed on Logan's if it were required to adopt an alternative technique in our analysis of whether Logan's was entitled to judgment as a matter of law on the question of whether it owed a duty to Ms. Freemon. *See Doe v. Linder, supra.*

[4] A copy of the Logan's menu, which includes a one page picture of a basket of peanuts, pictures of peanuts on pages containing the menu items and the drink menu superimposed on another picture of a basket of peanuts, is attached as an exhibit to Mr. Noble's affidavit.

[5] Ms. Freemon filed a motion to exclude Mr. Noble's statement that "[d]ry roasted peanuts are not oily and their shells do not have an oily residue" on the ground that Mr. Noble was not qualified as an expert and the statement was an expert opinion. The trial court denied, as moot, the motion to exclude in its order granting summary judgment. We determine that the trial court properly denied the motion but on the ground that Mr. Noble's statement was properly admissible in accordance with Rule 701, Tenn. R. Evid.

The affidavit of Mr. Noble establishes that the presence of peanut shells on the floor was part of Logan's decor, was open and visible to customers, and that the routine practice of Logan's was to sweep during periods where peanuts had accumulated; in addition, Logan's served peanuts whose shells did not have an oily residue. These facts support Logan's contention that there was no foreseeable risk of injury in the practice of allowing peanut shells to remain on the floor or that any such risk was minimal and, consequently, the probability that Ms. Freemon would fall was not foreseeable.[6] Taken together, these facts[7] establish that likelihood of danger to customers as a result of the presence of peanut shells was not probable and the facts were sufficient to negate an essential element of Ms. Freemon's claim, *viz.*, that her injury was foreseeable and, consequently, that a duty of care existed.

Having had an essential element of her claim negated, Ms. Freemon was required to produce evidence of specific facts establishing that genuine issues of material fact existed, such as to avoid summary judgment. In her response to the motion, Ms. Freemon filed her affidavit, which stated in pertinent part:

> 3. On or about June 18, 2004, I was a customer at the Logan's restaurant located at 5300 Hickory Hollow Lane, Antioch, Tennessee.
>
> 4. I had been a customer of Logan's restaurant in Davidson County, Tennessee on at lease [sic] two prior occasions before June 18, 2004.
>
> 5. . . . While walking to the table, I was walking on a wooden floor and I slipped and fell on peanuts, peanut shells and/or peanut oil.
>
> 6. Peanuts were placed on the floor throughout the restaurant and any path I took to get to my table would have taken me over peanut shells.
>
> ***
>
> 9. On June 18, 2004, the floor at Logan's in Antioch, Tennessee was in a dangerous condition. The Logan's floor was slippery due to peanuts, peanut shells, and/or peanut oil. Additionally, the floor was oily. I was able to see oil on the floor. It was shiny.
>
> 10. Peanut shells on a restaurant floor creates [sic] a defective or inherently dangerous condition. Peanut shells on the floor made the floor slippery. I believe that the peanut and/or peanut shells may have moved, rolled, and/or shift [sic] when I stepped on them while walking to my table.

Viewing the factual statements of Ms. Freemon's affidavit in a light most favorable to her, as we are obliged to do, her statements that the floor was slippery and oily and that she was able to see oil on the floor are sufficient to satisfy her burden to produce "additional evidence establishing the existence of a genuine issue for trial." *McCarley*, 960 S.W.2d at 588. The determination of

---

[6] We do not hold that, simply because the peanut shells were visible, Logan's owed no duty to Ms. Freemon; rather, we hold that the visibility of the peanut shells is a fact material to the foreseeability issue.

[7] These facts were conceded in Ms. Freemon's response to Logan's statement of undisputed facts, except that Ms. Freemon disputed in accordance with her motion to exclude a portion of the affidavit of Mr. Noble, that dry roasted peanuts do not have an oily residue. *See* footnote 5, *supra*.

foreseeability and, consequently, duty, then focuses on whether the facts contained in her statements create a genuine issue of whether the likelihood of danger was increased to the point where her injury was foreseeable. We cannot answer this question in the negative. A jury could find that the foreseeability of injury increased as a result of the operation of the practice at the particular time, e.g., if the shells had accumulated to a point where a risk of injury became likely or if there was a substance other than peanut oil on the floor which had become obscured. *See, e.g, Fox v. Food Lion*, 2000 WL 1424805 (Tenn. Ct. App. Sept. 21, 2000) (holding it reasonable for a store to expect that a customer's attention would be distracted, causing her to fall over an empty display base).

On the record before us, Logan's did not carry its burden of establishing that there were no genuine issues of material fact and, consequently, was not entitled to summary judgment on the issue of whether it owed a duty to Ms. Freemon.[8]

B. Ms. Freemon's Negligence

In granting summary judgment to Logan's, the trial court also found that no reasonable jury could find other than she was more than 50% at fault. The necessity of apportioning fault between Ms. Freemon and Logan's arose as a result of consideration of Logan's defense of comparative negligence; for purposes of our analysis, therefore, we assume that Ms. Freemon has made out a case of liability on the part of Logan's for maintaining a dangerous condition to exist.

In *Eaton v. McLain,* 891 S.W.2d 587 (Tenn. 1995), the Tennessee Supreme Court addressed the circumstances in which a trial or appellate court could hold, as a matter of law, that the plaintiff's degree of fault was equal to or greater than the defendant's. The Court held that, under the system of comparative fault, the percentage of fault assigned to each party:

> should be dependent upon all the circumstances of the case, including such factors as: (1) the relative closeness of the causal relationship between the conduct of the defendant and the injury to the plaintiff; (2) the reasonableness of the party's conduct in confronting a risk, such as whether the party knew of the risk, or should have known of it; (3) the extent to which the defendant failed to reasonably use an existing opportunity to avoid injury to the plaintiff; (4) the existence of a sudden emergency requiring a hasty decision; (5) the significance of what the party was trying to accomplish by the conduct, such as an attempt to save another's life; and (6) the party's particular capacities, such as age, maturity, training, education, and so forth.

891 S.W.2d at 592 (internal citations omitted).

In support of the trial court's finding that Ms. Freemon was at least 50% negligent, Logan's cites: (1) her familiarity with the restaurant; (2) that she was not distracted or in a hurry; (3) that she had thrown peanut shells on the floor herself; (4) that peanut shells were everywhere and she could not walk to her table without stepping on them; (5) and that the floor was visibly shiny in the area

[8] In addition, we note the conflicting testimony of Mr. Noble and Ms. Freemon as to the presence of an oily substance or slick spots on the floor in the area where she fell.

where she fell. These matters demonstrate her knowledge of the condition and her belief that the presence of shells on the floor presented a risk; thus, the issue becomes the reasonableness of her conduct or, more to the point, whether a jury could find that she was negligent and, if so, to what degree. The fact that the condition of the restaurant was known to Ms. Freemon and that she proceeded to her table, does not, in and of itself, constitute negligence on her part or absolve Logan's from liability; the jury could determine that, despite the obvious presence of peanut shells on the floor, her actions were not negligent or that any negligence of Logan's was greater than hers. *See* Restatement (Second) of Torts, § 343A cmt f (1965).[9]

We must accept the facts in the light most favorable to Ms. Freemon and, consequently, are unable to say that the only finding a reasonable jury could make would be that she was negligent and that her negligence exceeded any negligence found on the part of Logan's.

IV. Conclusion

For the foregoing reasons, the judgment of the trial court is reversed and the case remanded for further proceedings in accordance with this opinion.

Costs are assessed to Logan's Roadhouse, Inc..

_____

RICHARD H. DINKINS, JUDGE

---

[9] "... the fact that the danger is known, or is obvious, is important in determining whether the invitee is to be charged with contributory negligence or assumption of risk. It is not, however, conclusive in determining the duty of the possessor, or whether he has acted reasonably under the circumstances."

Restatement (Second) of Torts, § 343A cmt f (1965).